**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

JERILYN QUON; APRIL FLORIO; JEFF 

QUON; STEVE TRUJILLO,

*Plaintiffs-Appellants,*

v.

ARCH WIRELESS OPERATING

COMPANY, INCORPORATED, a No. 07-55282

Delaware corporation; CITY OF D.C. No. ONTARIO, a municipal corporation; CV-03-00199-SGL

LLOYD SCHARF, individually and as OPINION Chief of Ontario Police

Department; ONTARIO POLICE

DEPARTMENT; DEBBIE GLENN,

individually and as a Sergeant of

Ontario Police Department,

*Defendants-Appellees.* 

Appeal from the United States District Court

for the Central District of California

Stephen G. Larson, District Judge, Presiding

Argued and Submitted

February 6, 2008—Pasadena, California

Filed June 18, 2008

Before: Harry Pregerson and Kim McLane Wardlaw,

Circuit Judges, and Ronald B. Leighton,\* District Judge.

Opinion by Judge Wardlaw

\*The Honorable Ronald B. Leighton, United States District Judge for

the Western District of Washington, sitting by designation.

6997

**COUNSEL**

Dieter C. Dammeier, Zahra Khoury, Lackie & Dammeier

APC, Upland, California, for the plaintiffs-appellants.

Dimitrios C. Rinos, Rinos & Martin, LLP, Tustin, California;

Kent L. Richland, Kent J. Bullard, Greines, Martin, Stein &

Richland LLP, Los Angeles, California, for defendantsappellees

City of Ontario, Ontario Police Department, and

Lloyd Scharf.

Bruce E. Disenhouse, Kinkle, Rodiger and Spriggs, Riverside,

California, for defendant-appellee Debbie Glenn.

John H. Horwitz, Schaffer, Lax, McNaughton & Chen, Los

Angeles, California, for defendant-appellee Arch Wireless,

Inc.

**OPINION**

WARDLAW, Circuit Judge:

This case arises from the Ontario Police Department’s

review of text messages sent and received by Jeff Quon, a

Sergeant and member of the City of Ontario’s SWAT team.

We must decide whether (1) Arch Wireless Operating Com-

QUON v. ARCH WIRELESS 7001

pany Inc., the company with whom the City contracted for

text messaging services, violated the Stored Communications

Act, 18 U.S.C. §§ 2701-2711 (1986); and (2) whether the

City, the Police Department, and Ontario Police Chief Lloyd

Scharf violated Quon’s rights and the rights of those with

whom he “texted”—Sergeant Steve Trujillo, Dispatcher April

Florio, and his wife Jerilyn Quon**1** —under the Fourth Amendment

to the United States Constitution and Article I, Section

1 of the California Constitution.

**I. FACTUAL BACKGROUND**

On October 24, 2001, Arch Wireless (“Arch Wireless”)

contracted to provide wireless text-messaging services for the

City of Ontario. The City received twenty two-way alphanumeric

pagers, which it distributed to its employees, including

Ontario Police Department (“OPD” or “Department”) Sergeants

Quon and Trujillo, in late 2001 or early 2002.

According to Steven Niekamp, Director of Information

Technology for Arch Wireless:

A text message originating from an Arch Wireless

two-way alphanumeric text-messaging pager is sent

to another two-way text-messaging pager as follows:

The message leaves the originating pager via a radio

frequency transmission. That transmission is

received by any one of many receiving stations,

which are owned by Arch Wireless. Depending on

the location of the receiving station, the message is

then entered into the Arch Wireless computer network

either by wire transmission or via satellite by

another radio frequency transmission. Once in the

Arch Wireless computer network, the message is

sent to the Arch Wireless computer server. Once in

the server, a copy of the message is archived. The

**1**Doreen Klein, a plaintiff below, has not filed an appeal.

7002 QUON v. ARCH WIRELESS

message is also stored in the server system, for a

period of up to 72 hours, until the recipient pager is

ready to receive delivery of the text message. The

recipient pager is ready to receive delivery of a message

when it is both activated and located in an Arch

Wireless service area. Once the recipient pager is

able to receive delivery of the text message, the Arch

Wireless server retrieves the stored message and

sends it, via wire or radio frequency transmission, to

the transmitting station closest to the recipient pager.

The transmitting stations are owed [sic] by Arch

Wireless. The message is then sent from the transmitting

station, via a radio frequency transmission,

to the recipient pager where it can be read by the

user of the recipient pager.

The City had no official policy directed to text-messaging

by use of the pagers. However, the City did have a general

“Computer Usage, Internet and E-mail Policy” (the “Policy”)

applicable to all employees. The Policy stated that “[t]he use

of City-owned computers and all associated equipment, software,

programs, networks, Internet, e-mail and other systems

operating on these computers is limited to City of Ontario

related business. The use of these tools for personal benefit is

a significant violation of City of Ontario Policy.” The Policy

also provided:

C. Access to all sites on the Internet is recorded

and will be periodically reviewed by the City.

The City of Ontario reserves the right to monitor

and log all network activity including e-mail

and Internet use, with or without notice. Users

should have no expectation of privacy or confidentiality

when using these resources.

D. Access to the Internet and the e-mail system is

**not** confidential; and information produced

either in hard copy or in electronic form is con-

sidered City property. As such, these systems

should not be used for personal or confidential

communications. Deletion of e-mail or other

electronic information may not fully delete the

information from the system.

E. The use of inappropriate, derogatory, obscene,

suggestive, defamatory, or harassing language

in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon

and Trujillo had signed an “Employee Acknowledgment,”

which borrowed language from the general Policy, indicating

that they had “read and fully understand the City of Ontario’s

Computer Usage, Internet and E-mail policy.” The Employee

Acknowledgment, among other things, states that “[t]he City

of Ontario reserves the right to monitor and log all network

activity including e-mail and Internet use, with or without

notice,” and that “[u]sers should have no expectation of privacy

or confidentiality when using these resources.” Two

years later, on April 18, 2002, Quon attended a meeting during

which Lieutenant Steve Duke, a Commander with the

Ontario Police Department’s Administration Bureau,

informed all present that the pager messages “were considered

e-mail, and that those messages would fall under the City’s

policy as public information and eligible for auditing.” Quon

“vaguely recalled attending” this meeting, but did not recall

Lieutenant Duke stating at the meeting that use of the pagers

was governed by the City’s Policy.

Although the City had no official policy expressly governing

use of the pagers, the City did have an informal policy

governing their use. Under the City’s contract with Arch

Wireless, each pager was allotted 25,000 characters, after

which the City was required to pay overage charges. Lieutenant

Duke “was in charge of the purchasing contract” and

responsible for procuring payment for overages. He stated

that “[t]he practice was, if there was overage, that the

7004 QUON v. ARCH WIRELESS

employee would pay for the overage that the City had. . . .

[W]e would usually call the employee and say, ‘Hey, look,

you’re over X amount of characters. It comes out to X amount

of dollars. Can you write me a check for your overage[?]’ ”

The informal policy governing use of the pagers came to

light during the Internal Affairs investigation, which took

place after Lieutenant Duke grew weary of his role as bill collector.

In a July 2, 2003 memorandum entitled “Internal

Affairs Investigation of Jeffery Quon,” (the “McMahon Memorandum”)

OPD Sergeant Patrick McMahon wrote that upon

interviewing Lieutenant Duke, he learned that early on

Lieutenant Duke went to Sergeant Quon and told

him the City issued two-way pagers were considered

e-mail and could be audited. He told Sergeant Quon

it was not his intent to audit employee’s [sic] text

messages to see if the overage is due to work related

transmissions. He advised Sergeant Quon he could

reimburse the City for the overage so he would not

have to audit the transmission and see how many

messages were non-work related. Lieutenant Duke

told Sergeant Quon he is doing this because if anybody

wished to challenge their overage, he could

audit the text transmissions to verify how many were

non-work related. Lieutenant Duke added the text

messages were considered public records and could

be audited at any time.

For the most part, Lieutenant Duke agreed with McMahon’s

characterization of what he said during his interview. Later,

however, during his deposition, Lieutenant Duke recalled the

interaction as follows:

I think what I told Quon was that he had to pay for

his overage, that I did not want to determine if the

overage was personal or business unless they wanted

me to, because if they said, “It’s all business, I’m not

QUON v. ARCH WIRELESS 7005

paying for it,” then I would do an audit to confirm

that. And I didn’t want to get into the bill collecting

thing, so he needed to pay for his personal messages

so we didn’t—pay for the overage so we didn’t do

the audit. And he needed to cut down on his transmissions.

According to the McMahon Memorandum, Quon remembered

the interaction differently. When asked “if he ever

recalled a discussion with Lieutenant Duke that if his textpager

went over, his messages would be audited . . . Sergeant

Quon said, ‘No. In fact he [Lieutenant Duke] said the other,

if you don’t want us to read it, pay the overage fee.’ ”

Quon went over the monthly character limit “three or four

times” and paid the City for the overages. Each time, “Lieutenant

Duke would come and tell [him] that [he] owed X

amount of dollars because [he] went over [his] allotted characters.”

Each of those times, Quon paid the City for the overages.

In August 2002, Quon and another officer again exceeded

the 25,000 character limit. Lieutenant Duke then let it be

known at a meeting that he was “tired of being a bill collector

with guys going over the allotted amount of characters on

their text pagers.” In response, Chief Scharf ordered Lieutenant

Duke to “request the transcripts of those pagers for auditing

purposes.” Chief Scharf asked Lieutenant Duke “to

determine if the messages were exclusively work related,

thereby requiring an increase in the number of characters officers

were permitted, which had occurred in the past, or if they

were using the pagers for personal matters. One of the officers

whose transcripts [he] requested was plaintiff Jeff Quon.”

City officials were not able to access the text messages

themselves. Instead, the City e-mailed Jackie Deavers, a

major account support specialist for Arch Wireless, requesting

the transcripts. According to Deavers,

7006 QUON v. ARCH WIRELESS

I checked the phone numbers on the transcripts

against the e-mail that I had gotten, and I looked into

the system to make sure they were actually pagers

that belonged to the City of Ontario, and they were.

So I took the transcripts and put them in a manila

envelope [and brought them to the City].

Deavers stated that she did not determine whether private

messages were being released, though she acknowledged that,

upon reviewing approximately four lines of the transcript, she

had realized that the messages were sexually explicit. She also

stated that she would only deliver messages to the “contact”

on the account, and that she would not deliver messages to the

“user” unless he was also the contact on the account. In this

case, the “contact” was the City.

After receiving the transcripts, Lieutenant Duke conducted

an initial audit and reported the results to Chief Scharf. Subsequently,

Chief Scharf and Quon’s supervisor, Lieutenant

Tony Del Rio, reviewed the transcripts themselves. Then, in

October 2002, Chief Scharf referred the matter to internal

affairs “to determine if someone was wasting . . . City time

not doing work when they should be.” Sergeant McMahon,

who conducted this investigation on behalf of Internal Affairs,

enlisted the help of Sergeant Glenn, also a member of Internal

Affairs. Sergeant McMahon released the McMahon Memorandum

on July 2, 2003. According to the Memorandum, the

transcripts revealed that Quon “had exceeded his monthly

allotted characters by 15,158 characters,” and that many of

these messages were personal in nature and were often sexually

explicit. These messages were directed to and received

from, among others, the other Appellants.

**II. PROCEDURAL BACKGROUND**

On May 6, 2003, Appellants filed a Second Amended

Complaint in the District Court for the Central District of California

alleging, *inter alia*, violations of the Stored Communi-

QUON v. ARCH WIRELESS 7007

cations Act (“SCA”) and the Fourth Amendment. After the

district court dismissed one of Appellants’ claims against

Arch Wireless pursuant to Federal Rule of Civil Procedure

12(b)(6), all parties filed numerous rounds of summary judgment

motions. On August 15, 2006, the district court denied

Appellants’ summary judgment motion in full, and granted in

part and denied in part Appellees’ summary judgment

motions.

Appellants appeal the district court’s holding that Arch

Wireless did not violate the SCA, 18 U.S.C. §§ 2701-2711.**2**

The district court found that Arch Wireless was a “remote

computing service” under § 2702(a), and that it therefore

committed no harm when it released the text-message transcripts

to its “subscriber,” the City.

Appellants also appeal the district court’s resolution of their

claims against the City, the Department, Scharf, and Glenn.**3**

Appellants argue that the City, the Department, and Scharf

violated Appellants’ Fourth Amendment rights to be free from

unreasonable search and seizure pursuant to 42 U.S.C.

§ 1983, and that the City, Department, Scharf, and Glenn violated

Article I, Section 1 of the California Constitution, which

protects a citizen’s right to privacy.**4** The district court

**2**Appellants fail to raise on appeal their claims against Arch Wireless for

violations of California Penal Code section 629.86 and their state-law

invasion of privacy claim under Article I, Section 1 of the California Constitution.

Therefore, they have waived those claims. *See Blanford v. Sacramento*

*County*, 406 F.3d 1110, 1114 n.8 (9th Cir. 2005).

**3**Appellants fail to raise on appeal their claims against the City, the

Department, Scharf, and Glenn for violations of the Stored Communications

Act and California Penal Code section 629.86. Jerilyn Quon fails to

address on appeal her claim for defamation and interference with prospective

business advantage; nor does Florio address her claim that seizure of

her personal pager and cell phone violated the Fourth Amendment. Therefore,

Appellants have waived those claims. *See Blanford*, 406 F.3d at

1114.

**4**“All people are by nature free and independent and have inalienable

rights. Among these are enjoying and defending life and liberty, acquiring,

possessing, and protecting property, and pursuing and obtaining safety,

happiness, and privacy.” CAL. CONST. art. I, § 1.

7008 QUON v. ARCH WIRELESS

addressed only the Fourth Amendment claim.**5** Relying on

*O’Connor v. Ortega*, 480 U.S. 709, 715, 725-26 (1987), the

district court determined that to prove a Fourth Amendment

violation, the plaintiff must show that he had a reasonable

expectation of privacy in his text messages, and that the government’s

search or seizure was unreasonable under the circumstances.

The district court held that, in light of Lieutenant

Duke’s informal policy that he would not audit a pager if the

user paid the overage charges, Appellants had a reasonable

expectation of privacy in their text messages as a matter of

law. Regarding the reasonableness of the search, the district

court found that whether Chief Scharf’s intent was to uncover

misconduct or to determine the efficacy of the 25,000 character

limit was a genuine issue of material fact. If it was the former,

the search was unreasonable; if it was the latter, the

search was reasonable. Concluding that Chief Scharf was not

entitled to qualified immunity on the Fourth Amendment

claim, and that the City and the Department were not entitled

to statutory immunity on the California constitutional privacy

claim, the district court held a jury trial on the single issue of

Chief Scharf’s intent. The jury found that Chief Scharf’s

intent was to determine the efficacy of the character limit.

Therefore, all defendants were absolved of liability for the

search.

On December 7, 2006, Appellants filed a motion to amend

or alter the judgment pursuant to Federal Rule of Civil Procedure

59(e), and a motion for new trial pursuant to Rule 59(a).

The district court denied each of these motions. Appellants

timely appeal.

**5**The district court limited its discussion to the Fourth Amendment

because “the arguments lodged by the governmental defendants against

plaintiffs’ invasion of privacy claim and state constitutional claim are the

same as those pressed against plaintiffs’ Fourth Amendment claim . . . .”

QUON v. ARCH WIRELESS 7009

**III. JURISDICTION AND STANDARD OF REVIEW**

The district court had jurisdiction pursuant to 28 U.S.C.

§§ 1331 and 1343. We have jurisdiction over final judgments

of the district courts pursuant to 28 U.S.C. § 1291.

We review a district court’s grant of summary judgment de

novo. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

In reviewing the grant of summary judgment, we “must determine,

viewing the evidence in the light most favorable to the

nonmoving party, whether genuine issues of material fact

exist and whether the district court correctly applied the relevant

substantive law.” *Id.*

**IV. DISCUSSION**

**A. Stored Communications Act**

**[1]** Congress passed the Stored Communications Act in

1986 as part of the Electronic Communications Privacy Act.

The SCA was enacted because the advent of the Internet presented

a host of potential privacy breaches that the Fourth

Amendment does not address. *See* Orin S. Kerr, *A User’s*

*Guide to the Stored Communications Act, and a Legislator’s*

*Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209-13

(2004). Generally, the SCA prevents “providers” of communication

services from divulging private communications to

certain entities and/or individuals. *Id.* at 1213. Appellants

challenge the district court’s finding that Arch Wireless is a

“remote computing service” (“RCS”) as opposed to an “electronic

communication service” (“ECS”) under the SCA,

§§ 2701-2711. The district court correctly concluded that if

Arch Wireless is an ECS, it is liable as a matter of law, and

that if it is an RCS, it is not liable. However, we disagree with

the district court that Arch Wireless acted as an RCS for the

City. Therefore, summary judgment in favor of Arch Wireless

was error.

7010 QUON v. ARCH WIRELESS

**[2]** Section 2702 of the SCA governs liability for both ECS

and RCS providers. 18 U.S.C. § 2702(a)(1)-(2). The nature of

the services Arch Wireless offered to the City determines

whether Arch Wireless is an ECS or an RCS. As the Niekamp

Declaration makes clear, Arch Wireless provided to the City

a service whereby it would facilitate communication between

two pagers—“text messaging” over radio frequencies. As part

of that service, Arch Wireless archived a copy of the message

on its server. When Arch Wireless released to the City the

transcripts of Appellants’ messages, Arch Wireless potentially

ran afoul of the SCA. This is because both an ECS and RCS

can release private information to, or with the lawful consent

of, “an addressee or intended recipient of such communication,”

*id.* § 2702(b)(1), (b)(3), whereas only an RCS can

release such information “with the lawful consent of . . . the

subscriber.” *Id.* § 2702(b)(3). It is undisputed that the City

was not an “addressee or intended recipient,” and that the City

was a “subscriber.”

**[3]** The SCA defines an ECS as “any service which provides

to users thereof the ability to send or receive wire or

electronic communications.” *Id.* § 2510(15). The SCA prohibits

an ECS from “knowingly divulg[ing] to any person or

entity the contents of a communication while in electronic

storage by that service,” unless, among other exceptions not

relevant to this appeal, that person or entity is “an addressee

or intended recipient of such communication.” *Id.*

§ 2702(a)(1), (b)(1), (b)(3). “Electronic storage” is defined as

“(A) any temporary, intermediate storage of a wire or electronic

communication incidental to the electronic transmission

thereof; and (B) any storage of such communication by an

electronic communication service for purposes of backup protection

of such communication.” *Id.* § 2510(17).

An RCS is defined as “the provision to the public of computer

storage or processing services by means of an electronic

communications system.” *Id.* § 2711(2). Electronic communication

system—which is simply the means by which an RCS

QUON v. ARCH WIRELESS 7011

provides computer storage or processing services and has no

bearing on how we interpret the meaning of “RCS”—is

defined as “any wire, radio, electromagnetic, photooptical or

photoelectronic facilities for the transmission of wire or electronic

communications, and any computer facilities or related

electronic equipment for the electronic storage of such communications.”

*Id.* § 2510(14). The SCA prohibits an RCS

from “knowingly divulg[ing] to any person or entity the contents

of any communication which is carried or maintained on

that service.” Unlike an ECS, an RCS may release the contents

of a communication with the lawful consent of a “subscriber.”

*Id.* § 2702(a)(2), (b)(3).

**[4]** We turn to the plain language of the SCA, including its

common-sense definitions, to properly categorize Arch Wireless.

An ECS is defined as “any service which provides to

users thereof the ability to send or receive wire or electronic

communications.” 18 U.S.C. § 2510(15). On its face, this

describes the text-messaging pager services that Arch Wireless

provided. Arch Wireless provided a “service” that

enabled Quon and the other Appellants to “send or receive . . .

electronic communications,” i.e., text messages. Contrast that

definition with that for an RCS, which “means the provision

to the public of computer storage or processing services by

means of an electronic communications system.” *Id.*

§ 2711(2). Arch Wireless did not provide to the City “computer

storage”; nor did it provide “processing services.” By

archiving the text messages on its server, Arch Wireless certainly

was “storing” the messages. However, Congress contemplated

this exact function could be performed by an ECS

as well, stating that an ECS would provide (A) temporary

storage incidental to the communication; and (B) storage for

backup protection. *Id.* § 2510(17).

This reading of the SCA is supported by its legislative history.

The Senate Report identifies two main services that providers

performed in 1986: (1) data communication; and (2)

7012 QUON v. ARCH WIRELESS

data storage and processing. First, the report describes the

means of communication of information:

[W]e have large-scale electronic mail operations,

computer-to-computer data transmissions, cellular

and cordless telephones, paging devices, and video

teleconferencing . . . . [M]any different companies,

not just common carriers, offer a wide variety of

telephone and other communications services.

S. REP. NO. 99-541, at 2-3 (1986). Second,

[t]he Committee also recognizes that computers are

used extensively today for the storage and processing

of information. With the advent of computerized

recordkeeping systems, Americans have lost the

ability to lock away a great deal of personal and

business information. For example, physicians and

hospitals maintain medical files in offsite data banks,

businesses of all sizes transmit their records to

remote computers to obtain sophisticated data processing

services. These services as well as the providers

of electronic mail create electronic copies of

private correspondence for later reference. This

information is processed for the benefit of the user

but often it is maintained for approximately 3

months to ensure system integrity.

*Id.* at 3. Under the heading “Remote Computer Services,” the

Report further clarifies that term refers to the processing or

storage of data by an off-site third party:

In the age of rapid computerization, a basic choice

has faced the users of computer technology. That is,

whether to process data inhouse on the user’s own

computer or on someone else’s equipment. Over the

years, remote computer service companies have

developed to provide sophisticated and convenient

QUON v. ARCH WIRELESS 7013

computing services to subscribers and customers

from remote facilities. Today businesses of all sizes

—hospitals, banks and many others—use remote

computing services for computer processing. This

processing can be done with the customer or subscriber

using the facilities of the remote computing

service in essentially a time-sharing arrangement, or

it can be accomplished by the service provider on the

basis of information supplied by the subscriber or

customer. Data is most often transmitted between

these services and their customers by means of electronic

communications.

*Id.* at 10-11.

In the Senate Report, Congress made clear what it meant by

“storage and processing of information.” It provided the following

example of storage: “physicians and hospitals maintain

medical files in offsite data banks.” Congress appeared to

view “storage” as a virtual filing cabinet, which is not the

function Arch Wireless contracted to provide here. The Senate

Report also provided an example of “processing of information”:

“businesses of all sizes transmit their records to

remote computers to obtain sophisticated data processing services.”

In light of the Report’s elaboration upon what Congress

intended by the term “Remote Computer Services,” it is

clear that, before the advent of advanced computer processing

programs such as Microsoft Excel, businesses had to farm out

sophisticated processing to a service that would process the

information. *See* Kerr, 72 GEO. WASH. L. REV. at 1213-14.

Neither of these examples describes the service that Arch

Wireless provided to the City.

**[5]** Any lingering doubt that Arch Wireless is an ECS that

retained messages in electronic storage is disposed of by

*Theofel v. Farey-Jones*, 359 F.3d 1066, 1070 (9th Cir. 2004).

In *Theofel*, we held that a provider of e-mail services, undisputedly

an ECS, stored e-mails on its servers for backup pro-

7014 QUON v. ARCH WIRELESS

tection. *Id.* at 1075. NetGate was the plaintiffs’ Internet

Service Provider (“ISP”). Pursuant to a subpoena, NetGate

turned over plaintiffs’ e-mail messages to the defendants. We

concluded that plaintiffs’ e-mail messages—which were

stored on NetGate’s server after delivery to the recipient—

were “stored ‘for purposes of backup protection’ . . . . within

the ordinary meaning of those terms.” *Id.* (citation omitted).

**[6]** The service provided by NetGate is closely analogous

to Arch Wireless’s storage of Appellants’ messages. Much

like Arch Wireless, NetGate served as a conduit for the transmission

of electronic communications from one user to

another, and stored those communications “as a ‘backup’ for

the user.” *Id.* Although it is not clear for whom Arch Wireless

“archived” the text messages—presumably for the user or

Arch Wireless itself—it is clear that the messages were

archived for “backup protection,” just as they were in *Theofel*.

Accordingly, Arch Wireless is more appropriately categorized

as an ECS than an RCS.

Arch Wireless contends that our analysis in *Theofel* of the

definition of “backup protection” supports its position. There,

we noted that “[w]here the underlying message has expired in

the normal course, any copy is no longer performing any

backup function. An ISP that kept permanent copies of temporary

messages could not fairly be described as ‘backing up’

those messages.” *Id.* at 1070. Thus, the argument goes, Arch

Wireless’s permanent retention of the Appellants’ text messages

could not have been for backup purposes; instead, it

must have been for storage purposes, which would require us

to classify Arch Wireless as an RCS. This reading is not persuasive.

First, there is no indication in the record that Arch

Wireless retained a permanent copy of the text-messages or

stored them for the benefit of the City; instead, the Niekamp

Declaration simply states that copies of the messages are “archived”

on Arch Wireless’s server. More importantly, *Theofel*’s

holding—that the e-mail messages stored on NetGate’s

server after delivery were for “backup protection,” and that

QUON v. ARCH WIRELESS 7015

NetGate was undisputedly an ECS—forecloses Arch Wireless’s

position.

**[7]** We hold that Arch Wireless provided an “electronic

communication service” to the City. The parties do not dispute

that Arch Wireless acted “knowingly” when it released

the transcripts to the City. When Arch Wireless knowingly

turned over the text-messaging transcripts to the City, which

was a “subscriber,” not “an addressee or intended recipient of

such communication,” it violated the SCA, 18 U.S.C.

§ 2702(a)(1). Accordingly, judgment in Appellants’ favor on

their claims against Arch Wireless is appropriate as a matter

of law, and we remand to the district court for proceedings

consistent with this holding.

**B. Fourth Amendment**

Appellants assert that they are entitled to summary judgment

on their Fourth Amendment claim against the City, the

Department, and Scharf, and on their California constitutional

privacy claim against the City, the Department, Scharf, and

Glenn. Specifically, Appellants agree with the district court’s

conclusion that they had a reasonable expectation of privacy

in the text messages. However, they argue that the issue

regarding Chief Scharf’s intent in authorizing the search never

should have gone to trial because the search was unreasonable

as a matter of law. We agree.

**[8]** “The ‘privacy’ protected by [Article I, Section 1 of the

California Constitution] is no broader in the area of search

and seizure than the ‘privacy’ protected by the Fourth

Amendment . . . .” *Hill v. Nat’l Collegiate Ath. Ass’n*, 7 Cal.

4th 1, 30 n.9 (1994). Accordingly, our analysis proceeds

under the Fourth Amendment to the United States Constitution.

The Fourth Amendment protects the “right of the people

to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures.” U.S. CONST.

amend. IV. “[T]he touchstone of the Fourth Amendment is

7016 QUON v. ARCH WIRELESS

reasonableness.” *United States v. Kriesel*, 508 F.3d 941, 947

(9th Cir. 2007) (citing *Samson v. California*, 126 S.Ct. 2193,

2201 n.4 (2006)). Under the “general Fourth Amendment

approach,” we examine “the totality of the circumstances to

determine whether a search is reasonable.” *Id.* “The reasonableness

of a search is determined by assessing, on the one

hand, the degree to which it intrudes upon an individual’s privacy

and, on the other, the degree to which it is needed for the

promotion of legitimate governmental interests.” *United*

*States v. Knights*, 534 U.S. 112, 118-19 (2001) (internal quotation

marks omitted).

**[9]** “Searches and seizures by government employers or

supervisors of the private property of their employees . . . are

subject to the restraints of the Fourth Amendment.”

*O’Connor*, 480 U.S. at 715. In *O’Connor*, the Supreme Court

reasoned that “[i]ndividuals do not lose Fourth Amendment

rights merely because they work for the government instead

of a private employer.” *Id.* at 717. However, the Court also

noted that “[t]he operational realities of the workplace . . .

may make *some* employees’ expectations of privacy unreasonable.”

*Id.* For example, “[p]ublic employees’ expectations

of privacy in their offices, desks, and file cabinets . . . may be

reduced by virtue of actual office practices and procedures, or

by legitimate regulation.” *Id.* The Court recognized that,

“[g]iven the great variety of work environments in the public

sector, the question whether an employee has a reasonable

expectation of privacy must be addressed on a case-by-case

basis.” *Id.* at 718.

Even assuming an employee has a reasonable expectation

of privacy in the item seized or the area searched, he must

also demonstrate that the search was unreasonable to prove a

Fourth Amendment violation: “public employer intrusions on

the constitutionally protected privacy interests of government

employees for noninvestigatory, work-related purposes, as

well as for investigations of work-related misconduct, should

be judged by the standard of reasonableness under all the cir-

QUON v. ARCH WIRELESS 7017

cumstances.” *Id.* at 725-26. Under this standard, we must

evaluate whether the search was “justified at its inception,”

and whether it “was reasonably related in scope to the circumstances

which justified the interference in the first place.” *Id.*

at 726 (internal quotation marks omitted).

*1. Reasonable Expectation of Privacy*

**[10]** The extent to which the Fourth Amendment provides

protection for the contents of electronic communications in

the Internet age is an open question. The recently minted standard

of electronic communication via e-mails, text messages,

and other means opens a new frontier in Fourth Amendment

jurisprudence that has been little explored. Here, we must first

answer the threshold question: Do users of text messaging

services such as those provided by Arch Wireless have a reasonable

expectation of privacy in their text messages stored

on the service provider’s network? We hold that they do.

In *Katz v. United States*, 389 U.S. 347 (1967), the government

placed an electronic listening device on a public telephone

booth, which allowed the government to listen to the

telephone user’s conversation. *Id.* at 348. The Supreme Court

held that listening to the conversation through the electronic

device violated the user’s reasonable expectation of privacy.

*Id.* at 353. In so holding, the Court reasoned, “One who occupies

[a phone booth], shuts the door behind him, and pays the

toll that permits him to place a call is surely entitled to assume

that the words he utters into the mouthpiece will not be broadcast

to the world. To read the Constitution more narrowly is

to ignore the vital role that the public telephone has come to

play in private communication.” *Id.* at 352. Therefore, “[t]he

Government’s activities in electronically listening to and

recording the petitioner’s words violated the privacy upon

which he justifiably relied while using the telephone booth

and thus constituted a ‘search and seizure’ within the meaning

of the Fourth Amendment.” *Id.* at 353.

7018 QUON v. ARCH WIRELESS

On the other hand, the Court has also held that the government’s

use of a pen register—a device that records the phone

numbers one dials—does not violate the Fourth Amendment.

This is because people “realize that they must ‘convey’ phone

numbers to the telephone company, since it is through telephone

company switching equipment that their calls are completed.”

*Smith v. Maryland*, 442 U.S. 735, 742 (1979). The

Court distinguished *Katz* by noting that “a pen register differs

significantly from the listening device employed in *Katz*, for

pen registers do not acquire the *contents* of communications.”

*Id.* at 741.

This distinction also applies to written communications,

such as letters. It is well-settled that, “since 1878, . . . the

Fourth Amendment’s protection against ‘unreasonable

searches and seizures’ protects a citizen against the warrantless

opening of sealed letters and packages addressed to him

in order to examine the contents.” *United States v. Choate*,

576 F.2d 165, 174 (9th Cir. 1978) (citing *Ex parte Jackson*,

96 U.S. 727 (1877)); *see also United States v. Jacobsen*, 466

U.S. 109, 114 (1984) (“Letters and other sealed packages are

in the general class of effects in which the public at large has

a legitimate expectation of privacy.”). However, as with the

phone numbers they dial, individuals do not enjoy a reasonable

expectation of privacy in what they write on the outside

of an envelope. *See United States v. Hernandez*, 313 F.3d

1206, 1209-10 (9th Cir. 2002) (“Although a person has a

legitimate interest that a mailed package will not be opened

and searched en route, there can be no reasonable expectation

that postal service employees will not handle the package or

that they will not view its exterior” (citations omitted)).

**[11]** Our Internet jurisprudence is instructive. In *United*

*States v. Forrester*, we held that “e-mail . . . users have no

expectation of privacy in the to/from addresses of their messages

. . . because they should know that this information is

provided to and used by Internet service providers for the specific

purpose of directing the routing of information.” *United*

QUON v. ARCH WIRELESS 7019

*States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008). Thus,

we have extended the pen register and outside-of-envelope

rationales to the “to/from” line of e-mails. But we have not

ruled on whether persons have a reasonable expectation of

privacy in the content of e-mails. Like the Supreme Court in

*Smith*, in *Forrester* we explicitly noted that “e-mail to/from

addresses . . . constitute addressing information and do not

necessarily reveal any more about the underlying contents of

communication than do phone numbers.” *Id.* Thus, we concluded

that “[t]he privacy interests in these two forms of communication

[letters and e-mails] are identical,” and that, while

“[t]he contents may deserve Fourth Amendment protection

. . . the address and size of the package do not.” *Id.* at 511.

**[12]** We see no meaningful difference between the e-mails

at issue in *Forrester* and the text messages at issue here.**6** Both

are sent from user to user via a service provider that stores the

messages on its servers. Similarly, as in *Forrester*, we also

see no meaningful distinction between text messages and letters.

As with letters and e-mails, it is not reasonable to expect

privacy in the information used to “address” a text message,

such as the dialing of a phone number to send a message.

However, users do have a reasonable expectation of privacy

in the content of their text messages vis-a-vis the service provider.

*Cf. United States v. Finley*, 477 F.3d 250, 259 (5th Cir.

2007) (holding that defendant had a reasonable expectation of

privacy in the text messages on his cell phone, and that he

consequently had standing to challenge the search). That Arch

Wireless may have been able to access the contents of the

messages for its own purposes is irrelevant. *See United States*

*v. Heckencamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007)

(holding that a student did not lose his reasonable expectation

of privacy in information stored on his computer, despite a

**6**Because Jeff Quon’s reasonable expectation of privacy hinges on the

OPD’s informal policy regarding his use of the OPD-issued pagers, *see*

*infra* pages 7027-29, this conclusion affects only the rights of Trujillo,

Florio, and Jerilyn Quon.

7020 QUON v. ARCH WIRELESS

university policy that it could access his computer in limited

circumstances while connected to the university’s network);

*United States v. Ziegler*, 474 F.3d 1184, 1189-90 (9th Cir.

2007) (holding that an employee had a reasonable expectation

of privacy in a computer in a locked office despite a company

policy that computer usage would be monitored). For, just as

in *Heckencamp*, where we found persuasive that there was

“no policy allowing the university actively to monitor or audit

[the student’s] computer usage,” 482 F.3d at 1147, Appellants

did not expect that Arch Wireless would monitor their text

messages, much less turn over the messages to third parties

without Appellants’ consent.

**[13]** We do not endorse a monolithic view of text message

users’ reasonable expectation of privacy, as this is necessarily

a context-sensitive inquiry. Absent an agreement to the contrary,

Trujillo, Florio, and Jerilyn Quon had no reasonable

expectation that Jeff Quon would maintain the private nature

of their text messages, or vice versa. *See United States v.*

*Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) (“[T]he maker of

a telephone call has a reasonable expectation that police officials

will not intercept and listen to the conversation; however,

the conversation itself is held with the risk that one of

the participants may reveal what is said to others.” (citing

*Hoffa v. United States*, 385 U.S. 293, 302 (1966))). Had Jeff

Quon voluntarily permitted the Department to review his text

messages, the remaining Appellants would have no claims.

Nevertheless, the OPD surreptitiously reviewed messages that

all parties reasonably believed were free from third-party

review. As a matter of law, Trujillo, Florio, and Jerilyn Quon

had a reasonable expectation that the Department would not

review their messages absent consent from either a sender or

recipient of the text messages.

**[14]** We now turn to Jeff Quon’s reasonable expectation of

privacy, which turns on the Department’s policies regarding

privacy in his text messages. We agree with the district court

that the Department’s informal policy that the text messages

QUON v. ARCH WIRELESS 7021

would not be audited if he paid the overages rendered Quon’s

expectation of privacy in those messages reasonable.

The Department’s general “Computer Usage, Internet and

E-mail Policy” stated both that the use of computers “for personal

benefit is a significant violation of City of Ontario Policy”

and that “[u]sers should have no expectation of privacy or

confidentiality when using these resources.” Quon signed this

Policy and attended a meeting in which it was made clear that

the Policy also applied to use of the pagers. If that were all,

this case would be analogous to the cases relied upon by the

Appellees. *See, e.g.*, *Muick v. Glenayre Elecs*., 280 F.3d 741,

743 (7th Cir. 2002) (“[Employer] had announced that it could

inspect the laptops that it furnished for the use of its employees,

and this destroyed any reasonable expectation of privacy

that [employee] might have had and so scotches his claim.”);

*Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-35 (D. Nev.

1996) (finding a diminished expectation of privacy under the

Fourth Amendment where police department had issued a

memorandum informing employees that messages sent on

city-issued pagers would be “logged on the [department’s]

network” and that certain types of messages were “banned

from the system,” and because any employee “with access to,

and a working knowledge of, the Department’s computer system”

could see the messages); *see also O’Connor*, 480 U.S.

at 719 (noting that expectation of privacy would not be reasonable

if the employer “had established any reasonable regulation

or policy discouraging employees . . . from storing

personal papers and effects in their desks or file cabinets”);

*Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328,

1335 (9th Cir. 1987) (“We conclude that [the employee]

would enjoy a reasonable expectation of privacy in areas

given over to his exclusive use, unless he was on notice from

his employer that searches of the type to which he was subjected

might occur from time to time for work-related purposes.”).

7022 QUON v. ARCH WIRELESS

**[15]** As the district court made clear, however, such was

not the “operational reality” at the Department. The district

court reasoned:

Lieutenant Duke made it clear to the staff, and to

Quon in particular, that he would *not* audit their pagers

so long as they agreed to pay for any overages.

Given that Lieutenant Duke was the one in charge of

administering the use of the city-owned pagers, his

statements carry a great deal of weight. Indeed,

before the events that transpired in this case the

department did not audit any employee’s use of the

pager for the eight months the pagers had been in

use.

Even more telling, Quon had exceeded the 25,000 character

limit “three or four times,” and had paid for the overages

every time without anyone reviewing the text of the messages.

This demonstrated that the OPD followed its “informal policy”

and that Quon reasonably relied on it. Nevertheless, without

warning, his text messages were audited by the

Department. Under these circumstances, Quon had a reasonable

expectation of privacy in the text messages archived on

Arch Wireless’s server.

Appellees argue that, because Lieutenant Duke was not a

policymaker, his informal policy could not create an objectively

reasonable expectation of privacy. Moreover, Lieutenant

Duke’s statements “were specific to his own billcollecting

practices” and were “limited to . . . an accounting

audit. He did not address privacy rights.” However, as the district

court pointed out, “Lieutenant Duke was the one in

charge of administering the use of the city-owned pagers,

[and] his statements carry a great deal of weight.” That Lieutenant

Duke was not the official policymaker, or even the

final policymaker, does not diminish the chain of command.

He was in charge of the pagers, and it was reasonable for

QUON v. ARCH WIRELESS 7023

Quon to rely on the policy—formal or informal—that Lieutenant

Duke established and enforced.

**[16]** Appellees also point to the California Public Records

Act (“CPRA”) to argue that Quon had no reasonable expectation

of privacy because, under that Act, “public records are

open to inspection at all times . . . and every person has a right

to inspect any public record.” CAL GOV’T CODE § 6253.

Assuming for purposes of this appeal that the text messages

archived on Arch Wireless’s server were public records as

defined by the CPRA,**7** we are not persuaded by Appellees’

argument. The CPRA does not diminish an employee’s reasonable

expectation of privacy. As the district court reasoned,

“There is no evidence before the [c]ourt suggesting that

CPRA requests to the department are so widespread or frequent

as to constitute ‘an open atmosphere so open to fellow

employees or the public that no expectation of privacy is reasonable.’

” (quoting *Leventhal v. Knapek*, 266 F.3d 64, 74 (2d

Cir. 2001) (internal quotation marks omitted)).

**[17]** The Fourth Amendment utilizes a reasonableness standard.

Although the fact that a hypothetical member of the

public may request Quon’s text messages might slightly

diminish his expectation of privacy in the messages, it does

not make his belief in the privacy of the text messages objectively

unreasonable. *See Zaffuto v. City of Hammond*, 308

F.3d 485, 489 (5th Cir. 2002) (“[Defendant] also argues that

the existence of Louisiana’s public records law and a department

policy that calls would be taped suggests that it would

not be objectively reasonable for [plaintiff] to expect privacy

in making a personal phone call from work . . . . [The officers

testified that] they understood the policy to mean that only

calls coming into the communications room (where outside

**7**The Act defines “public records” as “any writing containing information

relating to the conduct of the public’s business prepared, owned, used,

or retained by any state or local agency regardless of physical form or

characteristics.” CAL GOV’T CODE § 6252(e).

7024 QUON v. ARCH WIRELESS

citizens would call) were being recorded, not calls from private

offices. A reasonable juror could conclude, on this evidence,

that [plaintiff] expected that his call to his wife would

be private, and that that expectation was objectively reasonable.”).

Therefore, Appellees’ CPRA argument is without

merit.

*2. Reasonableness of the Search*

Given that Appellants had a reasonable expectation of privacy

in their text messages, we now consider whether the

search was reasonable. We hold that it was not.

The district court found a material dispute concerning the

“actual *purpose* or *objective* Chief Scharf sought to achieve in

having Lieutenant Duke perform the audit of Quon’s pager.”

It reasoned that if Chief Scharf’s purpose was to uncover misconduct,

the search was unreasonable at its inception because

“the officers’ pagers were audited for the period when Lieutenant

Duke’s informal, but express policy of *not* auditing

pagers unless overages went unpaid was in effect.” The district

court further reasoned, however, that if the purpose was

to determine “the utility or efficacy of the existing monthly

character limits,” the search was reasonable because “the

audit was done for the benefit of (not as a punishment against)

the officers who had gone over the monthly character limits.”

Concluding that a genuine issue of material fact existed on

this point, the district judge determined that this was a question

for the jury. The jury found that Chief Scharf’s purpose

was to “determine the efficacy of the existing character limits

to ensure that officers were not being required to pay for

work-related expenses,” rendering a verdict in favor of the

City, the Department, Scharf, and Glenn.

Given that a jury has already found that Chief Scharf’s purpose

in auditing the text messages was to determine the efficacy

of the 25,000 character limit, we must determine—

QUON v. ARCH WIRELESS 7025

keeping that purpose in mind—whether the search was nevertheless

unconstitutional.

A search is reasonable “at its inception” if there are “reasonable

grounds for suspecting . . . that the search is necessary

for a noninvestigatory work-related purpose such as to

retrieve a needed file.” *O’Connor*, 480 U.S. at 726. Here, the

purpose was to ensure that officers were not being required to

pay for work-related expenses. This is a legitimate workrelated

rationale, as the district court acknowledged.

**[18]** However, the search was not reasonable in scope. As

*O’Connor* makes clear, a search is reasonable in scope “when

the measures adopted are reasonably related to the objectives

of the search and not excessively intrusive in light of . . . the

nature of the [misconduct].” *Id.* (internal quotation marks

omitted). Thus, “if less intrusive methods were feasible, or if

the depth of the inquiry or extent of the seizure exceeded that

necessary for the government’s legitimate purposes . . . the

search would be unreasonable . . . .” *Schowengerdt*, 823 F.2d

at 1336. The district court determined that there were no lessintrusive

means, reasoning that talking to the officers beforehand

or looking only at the numbers dialed would not have

allowed Chief Scharf to determine whether 25,000 characters

were sufficient for work-related text messaging because that

required examining the content of all the messages. Therefore,

“the only way to accurately and definitively determine

whether such hidden costs were being imposed by the

monthly character limits that were in place was by looking at

the actual text-messages used by the officers who exceeded

the character limits.”

**[19]** We disagree. There were a host of simple ways to verify

the efficacy of the 25,000 character limit (if that, indeed,

was the intended purpose) without intruding on Appellants’

Fourth Amendment rights. For example, the Department

could have warned Quon that for the month of September he

was forbidden from using his pager for personal communica-

7026 QUON v. ARCH WIRELESS

tions, and that the contents of all of his messages would be

reviewed to ensure the pager was used only for work-related

purposes during that time frame. Alternatively, if the Department

wanted to review past usage, it could have asked Quon

to count the characters himself, or asked him to redact personal

messages and grant permission to the Department to

review the redacted transcript. Under this process, Quon

would have an incentive to be truthful because he may have

previously paid for work-related overages and presumably

would want the limit increased to avoid paying for such overages

in the future. These are just a few of the ways in which

the Department could have conducted a search that was reasonable

in scope. Instead, the Department opted to review the

contents of all the messages, work-related and personal, without

the consent of Quon or the remaining Appellants. This

was excessively intrusive in light of the noninvestigatory

object of the search, and because Appellants had a reasonable

expectation of privacy in those messages, the search violated

their Fourth Amendment rights.

*3. Qualified Immunity for Chief Scharf*

Chief Scharf asserts that, even if we conclude that he violated

Appellants’ Fourth Amendment and California constitutional

privacy rights, he is entitled to qualified immunity. We

agree.

When determining whether qualified immunity applies, we

engage in the following two-step inquiry. First, we ask,

“[t]aken in the light most favorable to the party asserting the

injury, do the facts alleged show the officer’s conduct violated

a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201

(2001). If we answer this question in the affirmative, as we do

here, we then proceed to determine “whether the right was

clearly established.” *Id.* “This inquiry . . . must be undertaken

in light of the specific context of the case, not as a broad general

proposition.” *Id.* Specifically, “[t]he relevant, dispositive

inquiry in determining whether a right is clearly established

QUON v. ARCH WIRELESS 7027

is whether it would be clear to a reasonable officer that his

conduct was unlawful in the situation he confronted.” *Id.* at

202.

Chief Scharf argues that, “[i]n 2002, there was no clearly

established law from the Supreme Court or our Circuit governing

the right of a government employer to review text messages

on government-issued pagers in order to determine

whether employees are engaging in excessive personal use of

the pagers while on duty.” Chief Scharf misconstrues *Saucier*.

While there may be no case with a holding that aligns perfectly

with the factual scenario presented here, it was clear at

the time of the search that an employee is free from unreasonable

search and seizure in the workplace. *See, e.g.*, *O’Connor*,

480 U.S. at 715 (1987); *Schowengerdt*, 823 F.2d at 1335

(1987); *Ortega v. O’Connor*, 146 F.3d 1149, 1157 (9th Cir.

1998) (“[I]t was clearly established in 1981 that, in the

absence of an accepted practice or regulation to the contrary,

government employees . . . had a reasonable expectation of

privacy in their private offices, desks, and file cabinets,

thereby triggering the protections of the Fourth Amendment

with regard to searches and seizures.”).

**[20]** Nevertheless, we ultimately agree with Chief Scharf

because, at the time of the search, there was no clearly established

law regarding whether users of text-messages that are

archived, however temporarily, by the service provider have

a reasonable expectation of privacy in those messages. Therefore,

Chief Scharf is entitled to qualified immunity.

*4. Statutory Immunity on the California Constitutional*

*Claim*

The City and the Department contend that they are shielded

from liability on the California constitutional claim. We conclude

that the district court correctly determined that the City

and the Department are not protected by statutory immunity.

7028 QUON v. ARCH WIRELESS

California Government Code section 821.6 provides that

“[a] public employee is not liable for injury caused by his

instituting or prosecuting any judicial or administrative proceeding

within the scope of his employment, even if he acts

maliciously and without probable cause.” “The policy behind

section 821.6 is to encourage fearless performance of official

duties. State officers and employees are encouraged to investigate

and prosecute matters within their purview without fear

of reprisal from the person or entity harmed thereby.” *Shoemaker*

*v. Myers*, 2 Cal. App. 4th 1407, 1424 (1992) (citations

omitted). Immunity “also extends to actions taken in preparation

for formal proceedings. Because investigation is an

essential step toward the institution of formal proceedings, it

is also cloaked with immunity.” *Amylou R. v. County of Riverside*,

28 Cal. App. 4th 1205, 1209-10 (1994) (internal quotation

marks omitted).

**[21]** Although Chief Scharf ordered an “investigation” in

the ordinary sense of the word, the investigation never could

have led to a “judicial or administrative proceeding” because

Lieutenant Duke’s informal policy permitted officers to use

the pagers for personal purposes and to exceed the 25,000

character limit. Thus, Quon could have committed no misconduct,

a prerequisite for a formal proceeding against him. As

such, the City’s and Department’s conduct does not fall

within California Government Code section 821.6, and they

are not entitled to statutory immunity.

**V. CONCLUSION**

As a matter of law, Arch Wireless is an “electronic communication

service” that provided text messaging service via

pagers to the Ontario Police Department. The search of

Appellants’ text messages violated their Fourth Amendment

and California constitutional privacy rights because they had

a reasonable expectation of privacy in the content of the text

messages, and the search was unreasonable in scope. While

Chief Scharf is shielded by qualified immunity, the City and

QUON v. ARCH WIRELESS 7029

the Department are not shielded by statutory immunity. In

light of our conclusions of law, we affirm in part, reverse in

part, and remand to the district court for further proceedings

on Appellants’ Stored Communications Act claim against

Arch Wireless, and their claims against the City, the Department,

and Glenn under the Fourth Amendment and California

Constitution.

Because we hold that Appellants prevail as a matter of law

on their claims against Arch Wireless, the City, the Department,

and Glenn, we need not reach their appeal from the

denial of their motions to alter or amend the judgment and for

a new trial under Federal Rule of Civil Procedure 59. The parties

shall bear their own costs of appeal.

**AFFIRMED in part, REVERSED in part, and**

**REMANDED for Further Proceedings.**

7030 QUON v. ARCH WIRELESS